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No. _____

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In The
SUPREME COURT OF THE UNITED STATES
October term, 1988

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MERLIN BISHOP, et al.,
Petitioners,

vs.

GEORGE MICHAEL GWALTNEY, et al.,
Respondents.

_____

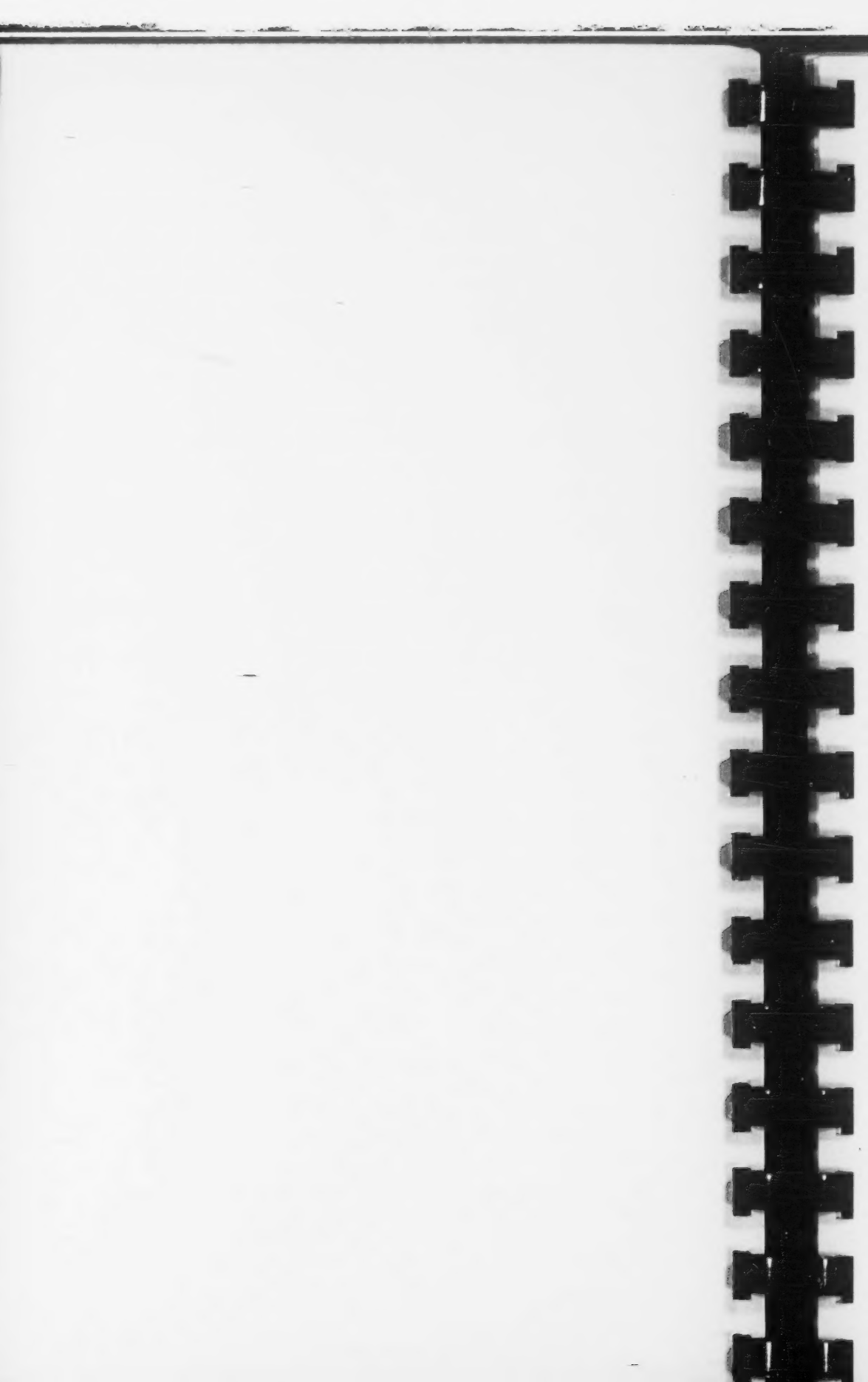
On petition for Writ of Certiorari to the California Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a state court action brought under 42 U.S.C. § 1983 and the 14th Amendment against the California Highway Patrol for its on-duty officer's murder of a female motorist, subject to dismissal because the California Court of Appeal rules that a state agency is not a "person" within the meaning of § 1983?

2. Is a § 1983 state court action against the California Highway Patrol doomed to dismissal under *Monell 's* anti-agency dictum, even though the state court did not consider petitioners' claims that:

a) *Monell* is not binding in state court,

b) California has waived agency immunity by Gov. Code § 815.2 and Vehicle Code § 17001,

c) Both § 1988 and California common law allow state substantive law to enhance the § 1983 federal remedy in astate court action, and

d) Agency liability has been adequately plead to bring the case under *Brandon v. Holt* in any event?

3. Does an action brought in state court directly under the 14th Amendment of the Constitution lie against the California Highway Patrol *via Bivens* and *Nevada v. Hall* on the one hand, and *via* numerous state and federal direct action cases on the other, irrespective of the "personhood" and *respondeat superior* issues incident to actions against government entities in federal court under § 1983?

4. Does the conviction in federal court of the state's police officer for the criminal violation under 18 U.S.C. § 242 of a motorist's civil rights by taking her life, preclusively compel by "state action" the California Highway Patrol's liability under 42 U.S.C. § 1983 and the 14th Amendment for deprivation of the same civil rights?

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OPINION BELOW

The Order of the California Supreme Court denying petitioners' petition for review was filed April 27, 1988. On January 29, 1988 the California Court of Appeal for the Fourth Appellate District affirmed the Order of the Superior Court of San Bernardino County upholding the Attorney General's demurrer and dismissing petitioners' first amended complaint.[1]

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1)

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1 The parties to the action are Merlin Bishop and June Bishop, as administrators of the estate of Robin Bishop, deceased, and individually on their own behalf vs. George Michael Gwaltney, James Burchett, Junior David Martin, Leonard De Groff, individually and as officers of the California Highway Patrol, and The Department Of The California Highway Patrol, a state agency, and Does I through XX.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Amendment XIV, § 1.

2. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983.

3. Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any state, territory, or district to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life. 18 U.S.C. § 242.

4. The jurisdiction in civil...matters conferred on the district courts by the [Civil Rights Acts]...., for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies...., the common law, as modified and changed by the constitution and

statutes of the State wherein the court having jurisdiction of such civil....cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause....42 U.S.C. § 1988.

5. A Public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative. Gov. Code § 815.2.

6. A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment. Vehicle Code § 17001.

STATEMENT OF THE CASE

Petitioners alleged that on the night of January 11, 1982 near Barstow, California, George Michael Gwaltney, (Gwaltney), a highway patrolman clothed, motorized and armed by the California Highway Patrol (CHP), stopped Robin Bishop, a young attractive female motorist driving her car alone on Interstate 15 from Los Angeles to her home in Las Vegas. After handcuffing her, Gwaltney put Robin in his patrol unit and transported her to an isolated location. There, he raped Robin in the back seat of his patrol car and afterward executed her with one shot to the back of the head.

Petitioners also alleged that Gwaltney's prurient propensities were notorious among his colleagues and supervisors. His CHP locker sported a plaque proclaiming an interest and expertise in female genitalia and contained female undergarments and a card collection of the anatomical measurements of Gwaltney's female arrestees. Gwaltney on at least three prior occasions had fondled or had sex with young female motorists he had stopped for alleged infractions.

After two mistrials in San Bernardino County, Gwaltney was finally convicted in federal court for depriving Robin Bishop of her civil rights and sentenced to 90 years in federal prison. *United States v. Gwaltney,* 790 F.2d 1378 (9th Cir. 1986) cert. den., 107 S.Ct. 1337 (1987).

Robins' parents, having failed to comply with the 100 day claims presentation requirement of the California Government Tort Claims Act, filed their action under 42 U.S.C. §§ 1983, 1985, 1986, 1988 and the Fourth, Eighth and Fourteenth Amendment of the United States Constitution against Gwaltney, his supervisors and the CHP, charging cruel and unusual punishment, false imprisonment, unlawful search and seizure, sex discrimination, failure to protect, wrongful death, gross negligence, loss of parenthood, and deprivation of due process of law and of equal

protection of the laws.[2] The trial court's order of dismissal of all causes of action for failure to state a claim was affirmed on appeal as to all defendants except Gwaltney whose default was entered by the Superior Court clerk. The California Supreme Court denied review.

Petitioners sought to evade the state claims presentation bar by bringing a § 1983 civil rights action and to avoid the 11th Amendment bar by filing the action in state court. The court of appeal, however, relying on earlier California cases which petitioners thought to be an unthinking vestige of pre-Monell § 1983 doctrine, held that a state agency such as the CHP was not a

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2 The Court of Appeal's assertion at p. 13a that ".....plaintiffs' entire complaint was predicated only on section 1983" justifying its ignorging plaintiffs' direct action constitutional arguments, is erroneous. Paragraph 18, incorporated into every cause of action of the First Amended Complaint, states: "As a direct and proximate result of the above described unlawful, malicious, deliberate, and reckless acts and omissions of defendants committed under color of authority as patrolmen of the CHP and while acting in that capacity Robin Bishop suffered grievious bodily harm and loss of life, all in violation of her rights under the laws and Constitution of the United States, and in particular the Fourth, Eighth and Fourteenth Amendments thereof and 42 U.S.C. §§ 1983 and 1985(2)(3)." In addition, the body of the First, Second, Third, Fourth, Fifth, Seventh, Ninth, and Tenth causes of action expressly mention that defendants' conduct violates the Constitution of the United States. The court relied only on the caption of the First Amended Complaint for its statement.

"person" under § 1983 amenable to suit in a state court action, and that even were it such a "person", it would nevertheless not be liable under the *respondeat superior* strictures of *Monell v. Dept. of Social Services* 436 U.S. 658 (1978).

Petitioners argued that this Court had never held that a state was not a "person" amenable to suit under § 1983 in a state court action but had, to the contrary, strongly implied that it was. *Maine v. Thiboutot* 448 U.S. 1 (1980),n. 7, and that in any event the state was directly liable in its own courts for direct actions to redress federal constitutional violations. Petitioners contended that "The Fourteenth Amendment protects the individual against state action, not against wrongs done by individuals." *United states v. Guest*, 383 U.S. 745, 755 (1966),*Bivens v. Six Unknown Fed. Narcotics Agents* 403 U.S. 388 (1871).[3] *Bivens* had before been used in a

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3 After *Monroe v. Pape* 365 U.S. 167 (1961) barred municipal liability under § 1983, the *Bivens* direct action device invoking the 14th Amendment was successfully used to attack municipalities: *Turpin v. Mailet*, 579 F.2d 152 (2d. Cir.) (en banc), vacated and remanded for consideration in light of *Monell* sub nom. *City of West Haven v. Turpin* , 439 U.S. 974, 978 (1978), modified on remand, 591 F.2d 426(2d. Cir. 1979) (en banc) (Police brutality and illegal arrest alleged).; *Cox v. Stanton*, 529 F.2d 47 (4th Cir.1975); *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977); *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978); *Wiley v.*

state action brought under the federal constitution, *Strauss v. State* 330 A.2d 646, 648 (N.J. 1974).

Aside from *Bivens* and long before it, petitioners argued, this court had upheld actions both in federal and state courts brought directly under the constitution to grant redress, including damages: *White v. Greenhow* 114 U.S. 307, 308 (1884) (state official's seizure of property);*Ward v. Love County* 253 U.S.17 (1920) (unconstitutional collection of taxes); *Poindexter v. Greenhow* 114 U.S. 270 (1884) (unlawful seizure of property by State officer); *Hopkins v. Clemson Agriculture College*, 221 U.S. 636 (1911) (taking of property without just compensation); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931) (County officers collected tax in violation of Fourteenth Amendment).

Because § 1983 was procedural, not substantive law, petitioners had also argued that they were not subject to the *Monell*

Memphis Police Dept. 548 F.2d 1247 (6th Cir. 1977); *Amen v. City of Dearborn*, 532 F.2d 554 (6th Cir. 1976); *McDonald v. Illinois*, 557 F.2d 596 (7th Cir. 1977), cert denied, 434 U.S. 966 (1877); *Owen v. City of Independence*, 421 F. Supp. 1110 (W.D. Mo. 1976), 560 F.2d 925 (8th Cir. 1977), 438 U.S. 902 (1978), 589 F.2d 335 (8th Cir. 1978). *Section 1983: Sword and Shield*, American Bar Ass'n, p. 65. n. 15 (1983).

respondeat superior dictum but to the contrary, were entitled to rely on the substantive statutory and case law of California which holds that the agency employing an on-duty police officer is liable for intentional wrongful acts. Gov. Code § 815.2, Motor Veh. Code § 17001, *White v. County of Orange*, 166 CA. 3d 566 (1985), *Williams v. Horvath*, 16 C.3d 834 (1876).

Petitioners also argued, using *Moor v. Alameda County* 411 U.S. 693 (1973), that they were entitled under 42 U.S.C. § 1988 to apply state substantive agency law to implicate the CHP, and that in any event, they were not subject to the *Monell* agency dictum since they were proceeding directly against the state under the 14th amendment in its own courts rather than by way of § 1983 in a federal court.

Petitioners claimed that in any event their case was more like *Brandon v. Holt* 469 U.S. 464 (1985) than *Oklahoma City v. Tuttle* 471 U.S. 808 (1985) so that the CHP was both directly and vicariously liable for its agent's on-duty torts of constitutional dimension.

The California appeal court chose not to address the numerous issues raised on appeal with respect to the state's direct

liability for federal constitutional violations, the use of § 1988 to supply California common law to compensate for federal law deficiency in protecting civil rights, the procedural-substantive law dichotomy allowing the application of liability provisions of the state tort claims act in a §1983 state court action, and the waiver of agency immunity by Gov. Code § 815.2 and Vehicle Code § 17001.

Petitioners' arguments, in part, tracked a seminal article, "Sovereign Immunity and the Supremacy Clause: Damages Against States In Their Own Courts For Constitutional Violations" by Louis E. Wolcher, 69 Cal. L. Rev. 189 (1981). Yet the appeal court, restricted itself simply to following prior California decisions misconstruing the opinions of this court.

ARGUMENT

II[

THIBOUTOT IMPLICITLY ESTABLISHES THAT THE QUESTION OF WHETHER OR NOT THE STATE IS A 'PERSON' UNDER SECTION 1983 HAS NO RELEVANCE TO A STATE COURT SECTION 1983 ACTION

The california court's recourse to the simplistic formula derived from the § 1983 federal cases that a "state is not a person" is inconsistent on its face because a state is a "person" for *prospective* equitable relief under § 1983 even in federal court. The Eleventh Amendment protects the state from *retroactive* monetary relief whether or not it is a "person" in a § 1983 federal action, *Ex Parte Young* 209 U.S. 123 (1908); *Edelman v. Jordan,* 415 U.S. 651 (1974), and *Quern v. Jordan* 440 U.S. 332, 337 (1978), but not when the action is in a state court, *Maine v. Thiboutot, supra.*

In a state court § 1983 action, the state is liable for

retroactive relief at least to the extent of attorneys fees under § 1988 of the federal act because there is no state immunity to federal law. If Maine were not a "person" under § 1983, it could not have been liable for attorneys fees under § 1988 of the act. There is no mention in the *Thiboutot* opinion of a contention that Maine was not liable under § 1988 because it was not a "person" subject to the civil rights act. Rather, the defense in Thiboutot was :

> In the face of the plain language of section 1983 and our consistent treatment of that provision, petitioners nevertheless persist in suggesting that the phrase 'and laws' should be read or limited to civil rights and equal protection laws. 448 U.S. at p. 6.

The simple defense in Thiboutot would have been that Maine was not a 'person' under § 1983. Since such a defense was well known to be synonymous with Eleventh Amendment immunity, itself having no place in a state court action, the defendants in *Thiboutot* were relegated to contending that other language in § 1983 precluded using the Civil Rights Act to attack federal Social Security statutes

bearing no ostensible relation to civil rights. Aside from the footnote dictum, the total absence from *Thiboutot* of any discussion of the state's "personhood"shows that it is no issue in a state court action. The federal court cases to which the California court of appeal points *via* the prior California case of *Pyne v. Meese* 172 CA.3d 392 (1985) are thus unimportant in the wake of *Thiboutot.*

There is an obvious and insupportable inconsistency between this Court's ruling in *Monell* that the authors of § 1983 intended cities to be subject to suit as "persons" under § 1983 and the California court's conclusion that states are somehow not "persons" under § 1983. There is no apparent distinction between characterizing municipalities and other governmental subdivisions as "persons" subject to § 1983 jurisdiction, but not states, except alone for the Eleventh Amendment's protection of states.

The majority's rejection in *Quern* of Justice Brennan's cogent argument that § 1983's authors intended states to be persons under § 1983 was simply the majority's obedience to the supremacy of the Eleventh Amendment's immunity over a federal statute giving no direct signal of an intention to abrogate the constitutional protection. As seems abundantly clear from this Court's opinions,

when a state is the defendant in a § 1983 action in federal court, the focus is not "personhood" but immunity. Accordingly, the appellate court grievously erred in concluding that the CHP was not amenable to suit in California's courts because it was not a "person " under § 1983 of the Civil Rights Act.

II

GOVERNMENT ENTITY LIABILITY IN A STATE COURT ACTION IS NOT PRECLUDED BY *MONELL* OR *TUTTLE*

The California court of appeal thought *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658 (1978) an absolute bar to petitioners' attack against the CHP for *respondeat superior* liability, and totally ignored the California Supreme Court's application of substantive state tort claims act liability to enhance the § 1983

remedy when the action was brought in state court. *Williams v. Horvath*, 16 C.3d 834 (1976).

In *Williams*, the court held that § 1983 overrode the claims presentation requirements of the state tort claims act, but did not preclude application of the indemnification provisions of the state tort claims act in a state court action founded upon § 1983:

> ....entirely different considerations prevail in determining application of the claim requirement and the indemnification provisions of the Tort Claims Act. With regard to the claim section, the question is the extent to which state procedural obstacles may be invoked to obstruct the rights of plaintiffs relying on federal law. On the issue of indemnification, however, there can be no charge that these provisions obstruct invocation of the federal right; on the contrary, they enhance that right by insuring that the individual employee is able to meet his responsibilities. 16 C.3d at p. 847.

Similarly, petitioners' state court § 1983 action is not precluded by *Monell* from invoking against the CHP the *respondeat superior* provisions of the state tort claims act to enhance the federal remedy for violation of Robin Bishop's civil rights.

In addition to Gov. Code § 815.2's *respondeat superior* provisions, Vehicle Code § 17001 also renders the CHP vicariously liable for its agent's conduct using his patrol car to confine, rape and transport Robin to a place where he could conveniently kill her:

> A public entity is liable for **death** or injury to person or property proximately **caused by** a negligent or **wrongful act** or omission **in the operation of any motor vehicle** by an employee of the public entity acting within the scope of his employment. (emphasis added)

The vehicle need not be moving, but only in a "state of being at work" to impose liability. *Duarte v. City of San Jose* 100 C.A.3d 648, 657 (1980).

Finally, in *White v. County of Orange,* 166 C.A.3d 566

(1985) the employing entity was liable for a deputy sheriff's confining a female motorist in his patrol car, threatening to rape her:

> The use of authority is incidental to the duties of a police officer. The County enjoys tremendous benefits from the public's respect for that authority. Therefore, it must suffer the consequences when the authority is abused. 166 C.A.3d at p. 572.

Both by statute (Gov. Code § 815.2, Veh. Code § 17001) and by case law, *White v. County of Orange, supra,* California has shown no inclination to accept the *Monell* agency restrictions, but to the contrary, has adopted the more rational view that the government does not deserve more protection for its common law torts than for its constitutional torts. The California appeal court mistakenly thought it was sitting as a federal court merely because petitioners' action sounded in § 1983 and the 14th Amendment. Accordingly, it considered itself constrained by *Monell* when it was not.

Since the Fourteenth Amendment and § 1983 reach only "state action", not private conduct, the state employer is implicated

by definition, else would its conduct not be unconstitutional in the first place:

> If the doctrine of respondeat superior would impose liability on the city in an ordinary tort case, a fortiori, that doctrine must apply to the City in a §1983 case. ....When a police officer is engaged in the performance of his official duties, he is entrusted with civic responsibilities of the highest order. His mission is to protect the life, the liberty, and the property of the citizenry. If he violates the Federal Constitution while he is performing that mission I believe that federal law provides the citizen with a remedy against his employer as well as a remedy against him as an individual. .....if Congress intended to impose liability on municipal corporations, it must have intended to make them responsible for at least some of the conduct of their agents. 471 U.S. 839, 834, 835 (Stevens dissent)

Here, Officer Gwaltney's conduct was the most grievous and shocking imaginable for a law enforcement officer. Not only is the CHP's liability not precluded by *Monell* and *Tuttle*, it is compelled by *Brandon v. Holt*, 469 U.S. 464 (1985):

> [Petitioners], who were seventeen years of age, drove to the Memphis Hunt and Polo Club while on a date and parked in a dark and secluded driveway area...After approximately thirty minutes had elapsed, a Chevrolet pickup truck entered the driveway where [petitioners] were parked....The driver of the truck identified himself to [petitioners] as a police officer and showed them an official police identification card bearing the name and photograph of Robert J. Allen....Mr. Allen ordered Mr. Muse to step out of the car. After briefly questioning him, Officer Allen maliciously, and without provocation, struck Mr. muse in the neck and head with his fist and then stabbed and cut Muse on the neck and ear with a knife. As Officer Allen tried to break into the

> car where [petitioner] Elizabeth A. Brandon was seated, Mr. Muse jumped into the driver's side of the car and quickly drove away. Officer Allen fired one shot at the escaping vehicle from his police revolver. The bullet shattered the front window on the driver's side of the car. Officer Allen followed plaintiffs in a high speed chase which ended at St. Joseph's Hospital East, where plaintiffs sought medical care and assistance and reported the unprovoked attack upon them by Officer Allen.

This Court held:

> In at least three recent cases arising under § 1983, we have plainly implied that a judgment against a public servant "in his official capacity" imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond. We now make that point explicitly. 469 U.S. at pp. 471-472.

However notorious officer Allen's reputation in *Brandon* among the officers of the precinct, his recently installed supervisor had no actual knowledge of Allen's propensities or disciplinary record. 469 U.S. at p. 467. Because of the code of silence, few complaints were ever filed by police personnel. 469 U.S. at p. 467. Both the police supervisor and the governmental entity employing Allen, however, were liable since the supervisor was sued in his official capacity as a public servant.

Petitioners alleged that Officer Gwaltney's prurient propensities were not only notorious but outlandish:

> a. George Michael Gwaltney had stopped a twenty-three-year old female motorist for having a loud muffler but did not issue her a ticket, after which the motorist had sexual relations with Gwaltney in the back of his patrol car several times in the immediate vicinity where Robin Bishop's body was found.
>
> b. In march 1979, Gwaltney stopped a female

motorist and her boyfriend for "weaving" on I-15. After putting the boyfriend in the patrol unit out of view, Officer Gwaltney searched the female motorist three separate times in the area of her breasts and crotch, once after handcuffing her. The woman motorist was wearing a tight fitting tee shirt and blue jeans and it was obvious without a physical search that she carried no weapons. The frequency and lingering nature of each of the three searches indicated that their objective was sexual, not routine. Gwaltney did not search the boyfriend for weapons.

c. In February 1980, Officer Gwaltney gave another twenty-three-year-old woman a speeding ticket. He later appeared at her place of employment where he made vulgar sexual innuendoes toward her and stated that he would have the traffic charges against her dismissed, which he later did.

d. Officer Gwaltney kept file cards on women in

whom he had sexual interest. Two such cards were found in his California Highway Patrol locker, one of them with Robin Bishop's name on it.

e. Officer Gwaltney's locker at the California Highway Patrol locker in Barstow, California, had a plaque proclaiming his interest in female genitalia and the locker itself contained female undergarments and nightgowns. (First Amended Complaint, ¶15(a-g).)

Petitioners also alleged that Gwaltney's antics and attitude were known to his supervisor and encouraged as part of a pattern and practice of play-boy tolerance:

At all times material, the defendant James Burchett (Burchett) was a police officer of the CHP assigned as Captain of the Barstow Substation, having direct supervision of the defendant Gwaltney and acting as the agent and servant of the CHP in the course and scope of his employment, Burchett either knew or

should have known of Gwaltney's prurient interest in sex and of his pattern and practice of exacting sexual tribute from female motorists, but both accommodated Gwaltney's propensities and took no action to curb such conduct or to restrict Gwaltney's assignments from dealing with the female motoring public. Burchett warned Gwaltney of a weapons confiscation conducted as part of San Bernardino County's investigation into his culpability for killing Robin Bishop.....The department of the California Highway Patrol is an agency of the State of California charged with the safey of motorists on California Highways. It clothes its officers with the power to compel and the means to kill, but has a policy, pattern and practice of allowing the abuse of that power by some of its male officers in the Barstow area, including the defendant Gwaltney herein, for personal sexual gratification, so long as those officers meet their traffic citation quotas and generally comply with the department's regulations.

(First Amended Complaint, ¶¶ 5, 8).

If petitioners are successful in proving liability against Gwaltney's supervisor, Burchett, Gwaltney himself having defaulted, petitioners need then only prove up a case of damages. Once done, petitioners presumably, under *Brandon v. Holt*, are entitled to collect the judgment against the CHP:

> Part II of the Court's opinion announces the novel proposition that in suing a public official under 42 U.S.C. § 1983, a money judgment against a public official 'in his official capacity' is collectable against a public entity that employs the official. This startling doctrine - that a plaintiff may name as defendant only an agent, but nonetheless succeed in imposing damages on the principal who was not named - would seem to be at odds with the most rudimentary notions of pleading, parties and of due process. 469 U.S. at pp. 475-476, (Rehnquist, J., dissenting).

This Court held that because *Monell* came down after *Brandon* was filed and before it was decided, plaintiffs there could simply amend their complaint, but that such a formalism was not necessary as the city would have to respond in damages in any event for its agent's conduct in his official capacity. 469 U.S. at pp. 475-476.

All that the plaintiffs needed to prove in *Brandon* was that (1) the city's police officer viciously assaulted them and (2), the officer had a history of violent and irregular behavior that was well known within the department, 469 U.S. at p. 464. Again, Justice Rehnquist, in dissent, recognized that the majority had held that "naming an official as a defendant ' in his official capacity' is sufficient to impose liability upon a municipal corporation not named as defendant....." 469 U.S. at p. 477.

Since *Brandon* was decided in light of *Monell,* under federal law and in federal court, where a single officer's conduct is notorious and egregious, agency "policies" which keep the conduct from surfacing, establish entity liability, even when a newly installed supervisor in his official capacity and for whose oversight the city is liable, is ignorant of the subordinate officer's offending

conduct. 469 U.S. at p. 467.

Petitioners met their burden of pleading entity liability under *Brandon*. They are thus entitled to prove out their allegations as the plaintiffs in *Brandon* were allowed to do. The distinction between *Brandon* and *Tuttle* is that in *Tuttle*, the jury was allowed to infer entity liability from a single incident of misconduct without the benefit of additional evidence, 471 U.S. at p. 821. In *Brandon*, the jury had before it several incidences of officer misconduct known to the department but which department procedures obscured from the supervisor. Such procedures triggered entity liability by virtue of the fact that the supervisor was unknowing when he should not have been, 469 U.S. at p. 467.

Finally, *Moor v. Alameda County*, 411 U.S. 693 (1973) stands for the principle that § 1988 allows the application of California respondeat superior law where the laws of the United States are deficient to afford redress for the unconstitutional deprivation of civil rights:

> ...[B]ut in all cases where [laws of the United States] are not adapted to the object, are deficient in the

> provisions necessary to furnish suitable remedies....., the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil...cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause....42 U.S.C. § 1988.

Since *Monroe* at that time precluded entity liability, plaintiff in *Moor* argued that state respondeat superior law should be applied to supply the federal law deficiency. This Court held, however, that since *Monroe* expressly protected municipalities from liability, plaintiffs could not use state law to contravene federal law which the statute prevented as compared with furnishing suitable state law remedies to supplement deficient federal law, which the statute allowed:

> In effect, petitioners are arguing that their particular

> actions may be properly brought against this County on the basis of § 1983. But whatever the factual premises of *Monroe*, we find the construction which petitioners seek to impose upon § 1983 concerning the status of municipalities as "persons" to be simply untenable. 411 U.S. at p. 707.

The construction of § 1983 concerning the status of municipalities as "persons" is no longer untenable, but, to the exact contrary, such construction of the statute is now officially approved by *Monell*. Since by *Monell*, municipal immunity to a § 1983 action has disappeared, *Moor* has no further force to preclude the application, pursuant to § 1988, of Gov. Code § 815.2 and Vehicle Code § 17001 in order to establish respondeat superior liability against the CHP in state court. *Monell's respondeat superior* strictures are, after all, only policy nostrums, not even an attempted statutory construction of 1871 legislation. As such, they do not preclude the application in state court by § 1988 of California common law agency principles to enhance the federal remedy provided by § 1983.

In *Sullivan v. Little Hunting Park* 396 U.S.229 (1969), a racial discrimination case brought under § 1982, This court described the great breadth of § 1988:

> [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. **And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrongs done.**
> The existence of the command of the statutory right implies the existence of all necessary and appropriate remedies..
>
> > A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover

> the damages from the party in default is implied....
>
> This means, as we read in § 1988, that both federal and state rules on damages may be utilized, **whichever better serves the policies expressed in the federal statutes**.....The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired. 396 U.S. at p. 239, 240 (emphasis added)

The appeal court's artificial and facile arguments to support its decision that petitioners have no remedy under the federal constitution in state court for its most flagrant infraction, are out of harmony with the spirit and purpose of § 1983. Section 1983 is only a procedural remedy, not a substantive statute. It provides a vehicle for relief and recovery for violations of the federal constitution. It is the door both to federal and state courts for that purpose. Both Congress and the California Supreme Court intend the remedies thereby available to be plenary, not parsimonious. No

more fundamental rights secured by the Constitution exist than those brutally taken from Robin and her parents by the State in this case. Section 1988, therefore, is aptly suited to incorporate Gov. Code § 815.2 and Vehicle Code § 17001 in order to make the CHP liable.

III

THE CHP IS DIRECTLY LIABLE FOR THE CONSTITUTIONAL VIOLATIONS OF ITS AGENT ON THE BASIS OF THE CONSTITUTION ITSELF NOTWITHSTANDING THE EXISTENCE OR APPLICATION OF §§1983 AND 1988

Many of this Court's landmark constitutional cases arose not under § 1983, but under the constitution itself. *Brown v. Board of Education* 347 U.S. 483 (1954); *Youngstown Sheet & Tube Co. v. Sanger* 343 U.S. 579 (1952); Ex Parte Young 209 U.S. 123 (1908); *Bell v. Hood* 327 U.S. 678, 684 (1946); Wolscher, supra,

at pp. 272, 285. See also *First Lutheran Church v. Los Angeles County*, 482 U.S.__, 96 L.Ed.2d 250, 264 (1987) ("..claims for just compensation are grounded in the Constitution itself...Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of **the duty imposed by the Amendment**. *The suits were thus founded upon the Constitution of the United States.*" (emphasis (bold) added and (italics) in the original)

Similarly, state court actions have long permitted direct attack against Governmental entities for constitutional violations. *Ward v. Love County* 253 U.S. 17 (1920); *Poindexter v. Greenhow*, 114 U.S. 270 (1884); *Hopkins v. Clemson Agriculture College*, 221 U.S. 636 (1911); *Iowa-Des moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931).

This Court in *Nevada v. Hall*, 440 U.S. 410 (1978), having refused to protect Nevada's treasury from a Californian's tort damage claim, should no less refuse to protect California's treasury from a Nevada citizen's claim for the far more serious deprivation of constitutionally protected rights.

Article III, § 5 of the California Constitution allows suits

against California brought in such courts as shall be directed by law. The California Tort Claims act is no shield to such suits since by federal common law its claims presentation provisions do not apply to a § 1983 action, and the tort claims act on its face applies solely to torts, not to actions founded expressly and directly upon violations of the federal constitution itself.

This Court has created another avenue of direct action for constitutional violations, *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971). *Bivens* allowed direct action founded upon constitutional violations where § 1983 was not available because the suit was for damages against federal narcotics agents not operating by way of "state action". The federal court's jurisdiction was thus predicated not on § 1983 but on the general federal jurisdiction provisions of 21 U.S.C. § 1331. Thereafter the *Bivens* rationale was used successfully to obtain redress directly under the Fourteenth Amendment against municipalities which *Monroe* held were not "persons" within § 1983.

Since *Monell* overruled *Monroe,* there has been less need to employ the *Bivens* direct action rationale, but its rationale should be available to reach entities that are hiding behind the concepts of §

1983 "nonperson" status or the *respondeat superior* protection of *Monell*. It is not correct to say that *Bivens* only reaches federal officers, not state agencies themselves:

> This view is flawed, however, because it loses sight of the reason why the *Bivens* Court decided to imply a constitutional remedy in the first place. The Court recognized that there was something uniquely harmful about constitutional violations that was not adequately addressed by existing laws governing private relationships. And the extra something is the defendant officer's status as an arm of government that is forbidden by a written constitution from performing certain conduct that private law may inadequately police or even condone. **In short, the *Bivens* remedy holds the defendant officer liable as a surrogate for the government. He is liable precisely because the government, through him, has violated constitutional rights. When the surrogate is**

> **eliminated and the government, such as a state is sued directly, on its most basic level *Bivens* analysis yields the same result as when an officer is sued.** This is because existing remedial law, in the form of the section 1983 cause of action, is inadequate to answer all our constitutional concerns. Accordingly, judicial implication of a remedy is warranted -- "appropriate" in the vernacular of *Bivens*--unless there is some good reason not to do so. Wolscher, supra, at p. 286. (emphasis added)

The evil conduct of the State's officer in this case justifies extending the *Bivens* model to the state itself, as urged by Wolscher. The practice of direct action has been so widespread, that there is no reason why it is not appropriate in this case, especially if, as the court of appeal held, § 1983 was not available to petitioners because California was not a "person" under the Civil Rights Act, and that even if it were, the CHP would not be amenable to damages for the redress of its agent's constitutional violations because of the

respondeat superior dictum of *Monell*. Wolscher advocates application of the *Bivens* model to overcome just such casuistic evasions:

> ...[M]any state and lower federal courts, even before *Davis* and *Carlson*, used the theory of *Bivens* to imply constitutionally appropriate remedies against local governments who acted contrary to the fourteenth amendment.
>
> Indeed, the Supreme Court's own cases, prior to *Bivens*, that upheld the power of federal courts to award injunctions and damages against state officers acting unconstitutionally rested ultimately on a test of appropriateness rather than strict necessity. The plaintiffs in these cases might have been referred to state courts and the state tort law for relief, with Supreme Court review to assure that it was given. Instead the Court gave the broadest possible interpretation to 28 U.S.C. section 1331 and to the concept of state action, with the result that federal

courts assumed practical suzerainty over the unconstitutional acts of state officers even though this was not, in theory, strictly necessary to protect the plaintiff's rights.

Given this background and the policies voiced in *Davis* and *Carlson*, it is difficult to see why the basis of a *Bivens* cause of action does not extend to fourteenth amendment rights and to other justiciable rights against the states created by the Constitution . It may be that in a given case a particular claim against a particular defendant ought not to produce liability. But this goes to the question of what immunities are available as defenses to an otherwise appropriate *Bivens* cause of action, or at best to the existence on the facts of that case of special factors counselling hesitation in the judicial creation of the remedy. It does not undercut the applicability of *Bivens* as a general matter to constitutional provisions restraining state action.

....[J]ust as *Bivens* held that Congress' unexercised

legislative powers do not automatically foreclose a constitutionally implied damage remedy against federal officers, so too the mere existence of Congress' powers under section five of the fourteenth amendment has never been thought sufficient to preempt the power of courts to protect fourteenth amendment rights by appropriate remedies. Were the rule otherwise, much of what the Court has done in the field of constitutional rights against the states would be without legitimacy: **The lower federal courts' jurisdiction in many of its most important cases was invoked on the ground the plaintiffs' claims arose under the constitution, not under section 1983 or any other congressional enactment.** Wolscher at pp. 286-287. (emphasis added)

The CHP is also directly liable for its agent's depriving Robin Bishop of the privileges and immunities insured by the Fourteenth Amendment. Robin was returning through California to

is a "person" under § 1983 and whether or not a municipality is liable under a § 1983 action in federal court by *respondeat superior*.

Petitioners are entitled to direct action constitutional redress in the courts of California and in this federal court for the brutal rape and murder of their daughter by the state's on-duty officer charged with public safety on the federal interstate highways. He was armed with the state's authority to stop a motorist and the power to kill her, and he used it. By its agent's using authority expressly conferred by California, the state is liable to Robin's family for depriving Robin of her most fundamental civil rights.

IV

THE STATE POLICE OFFICER'S CRIMINAL CONVICTION UNDER 18 U.S.C. § 242 FOR VIOLATING THE DECEDENT'S CIVIL RIGHTS BY TAKING HER LIFE RENDERS THE STATE LIABLE AS A MATTER OF LAW UNDER 42 U.S.C. § 1983 AND THE 14TH AMENDMENT FOR VIOLATING THE

her home in Nevada when she was stopped, raped and killed by an on-duty officer of the state in full regalia, who had to have his uniform cleaned the day after the murder. The right to interstate travel is "a virtually unconditional personal right guaranteed by the Constitution to us all", and its violation is a deprivation of due process. *Shapiro v. Thompson* 394 U.S. 618, 643 (1969).

Remedies for the interruption of interstate travel have also been based on the denial of the equal protection clause of the Fourteenth Amendment:

> It is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority. The Equal Protection Clause 'does not....add anything to the rights which one citizen has under the Constitution against another.'.....'The Fourteenth Amendment protects the individual against state action, not against wrongs done by individuals.' This has been the view of the Court from the beginning. It remains the Court's

view today. *United States v. Guest*, 383 U.S. 745, 755 (1966)

In *Edwards v. California*, 314 U.S. 160 (1941), defendant was prosecuted for bringing into California an indigent in violation of state law. This Court held that the state law violated both the commerce clause and the privileges and immunities clause of the federal constitution:

> So, when the Fourteenth Amendment was adopted in 1868, it had been squarely and authoritatively settled that the right to move freely from State to State was a right of national citizenship. As such it was protected by the privileges and immunities clause of the fourteenth Amendment against state interference. 314 U.S. at p. 178, 179.

Where the state's officer, as here, interfered with Robin's right of national citizenship protected by the Fourteenth Amendment, the state is directly liable for the interference, whether or not California

DECEDENT'S CIVIL RIGHTS BY TAKING HER LIFE.

The state's officer could not have been convicted for the criminal deprivation of Robin Bishop's civil rights by taking her life absent a finding of "state action". 42 U.S.C. § 1983 is the civil counterpart of 18 U.S.C. § 242 so that the "state action" requisites are the same:

> "Under color" of law means the same thing of § 242 that it does in the civil counterpart to § 242, 42 U.S.C. § 1983..*United States v. Price,* 383 U.S. 787,794, n. 7 (1966).

Gwaltney's conviction for acting under "color of law" in killing Robin Bishop, and which constitutes "state action", makes him a **state actor**, a status precluding civil court review. *Emich Motors Corp. v. General Motors Corp.* 340 U.S. 558,569 (1951); *Otherson v. Department of Justice, I.N.S..*, 711 F.2d 267 (D.C. Cir. 1983) Inasmuch as his status as a state actor is a prerequisite to criminal conviction not subject to review by civil courts, it is binding upon

reflect a two-part approach to this question of "fair attribution." **First, the deprivation must be caused .....by a person for whom the State is responsible.....Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official...or because his conduct is otherwise chargeable to the State.** Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them. *Lugar v. Edmondson Oil Co.* 457 U.S. 922, 936 (1982) (emphasis added)

In *Lugar*, allegations of civil rights deprivations were upheld against private parties for using presumptively valid prejudgment attachment procedures allegedly defective under the due process clause of the constitution. In the case at bar, however, the status of Gwaltney as a state actor because he is a state official for whom the state is

the courts in this action for civil remedies.

The same requisite exists, as well, in actions founded upon the 14th Amendment and 42 U.S.C. § 1983, as is this one:

> As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that "most rights secured by the Constitution are protected only against infringement by governments,"....'In 1883, this Court...affirmed the essential dichotomy set forth in [the Fourteenth] Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield.' Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law...
>
> Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases

NOT FOR PUBLICATION

FILED

Jan 2 7 1988

Court of Appeal

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

MERLIN BISHOP, ET AL.

Plaintiffs and Appellants,

v.

GEORGE MICHAEL GWALTNEY, et al.,

Defendants and Respondents.

E003161

(Super. Ct. No. BCV BCV 1150)

OPINION

APPEAL from the Superior Court of San Bernardino

responsible is not, in the light of his criminal conviction for employing state action to take the life of Robin Bishop, open to question. Were he not so, he could not have been convicted and sentence to prison for 90 years. Were he not so, he could not be pursued in this action under § 1983 and the Fourteenth Amendment.

While the reach of "state action" has been fairly broad, *Lugar, supra,* and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), it is abundantly clear in this case that Gwaltney was a state actor using the power and prerogative of his position to deprive a woman, solely because she was a woman, of the ultimate civil right, her life. Since only a police officer by virtue of his status as a government official is so favorably situated as to be enabled and empowered to stop, frisk, or assume possession of any woman of his choice merely upon a colorable infraction of the traffic laws, § 1983 and the 14th Amendment were designed to, and must, provide redress and deterrence beyond the person of the individual officer:

> Of greatest importance, however, is the nature of the wrong for which § 1983 provides a remedy. The Act was primarily designed to provide

a remedy for violations of the United States constitution - wrongs of the most serious kind. As the Court recognizes, the individual officer in this case was engaged in "unconstitutional activity." But the conduct of an individual can be characterized as "unconstitutional" only if it is attributed to his employer. The Fourteenth Amendment does not have any application to purely private conduct. Unless an individual officer acts under color of official authority, § 1983 does not authorized any recovery against him. But if his relationship with his employer makes it appropriate to treat his conduct as state action for purposes of constitutional analysis, surely that relationship equally justifies the application of normal principles of tort law for the purpose of allocating responsibility for the wrongful state action. *Oklahoma City v. Tuttle, supra,* at pp. 839-840,(Stevens, J., dissenting)

Justice Stevens' reasoning and marshalling of historical authority

throughout his entire dissent in *Tuttle* is irrefutable, and should, in this case, petitioners respectfully submit, be the touchstone for putting liability for Gwaltney's conduct where it clearly and rightly belongs pursuant to 18 U.S.C. § 242, 42 U.S.C. § 1983, and the Fourteenth Amendment; squarely upon the California Highway Patrol, the source of the "state action" upon which Gwaltney's conviction and the jurisdiction of this court rest. The facts at bar are far different from the sole instance of excessive force in *Tuttle*, where the decedent had summoned the police as a hoax and pretended to be the robber whom he, himself, had reported. If the calculated and deliberate death of a motorist on interstate highways at the hands of a ruthless and flamboyant state police officer cannot be laid at the door of the highway patrol, then of what use is the Constitution? Who will patrol the Highway Patrol?

CONCLUSION

Between Robin Bishop and the California Highway Patrol organization stands only the Constitution and This Court. She was

female motorist traveling at night alone in the desert on an interstate highway. She was unarmed, and obliged by law to stop when a red light flashed behind her from the CHP's patrol vehicle driven by its armed and uniformed officer. He was a large man much older and stronger than she, standing behind a badge bearing the imprimatur of California.

The CHP trained, armed and supervised its officer. Gwaltney handcuffed Robin Bishop with CHP handcuffs which the CHP had taught him to use. He drove Robin in a CHP marked vehicle to a lonely place he had used to humble other young, attractive female motorists, he tuned in the CHP dispatcher on the CHP radio and forced Robin to have sexual intercourse with him while she was handcuffed in the back seat of the CHP vehicle. He then shot her in the back of the head with the CHP revolver, and radioed to the CHP dispatcher that he had found a women's body by the roadside. The CHP helped him avoid detection so that he could dispose of his CHP weapon, and have his CHP uniform cleaned, and the CHP gave him aid, comfort and remuneration during the investigation and criminal trials that followed. The words Gwaltney spoke as he apprehended Robin Bishop, whatever they were, were

the authoritative words of the CHP, and the bullet that killed her belonged to the CHP.

Neither Robin Bishop, nor any other attractive woman, would have stopped her car alone in the desert at night for George Michael Gwaltney, private citizen. Nothing but the paraphernalia provided by the CHP could have caused Robin to stop for George Michael Gwaltney, converse with him, be confined by him, and be touched by him. Gwaltney had possession of and was using CHP property with the CHP's consent. He could not have perpetrated his successive unspeakable crimes and constitutional violations upon Robin Bishop without the help, assistance, training, property and protection of the CHP.

Gwaltney would have gone free after the two San Bernardino County mistrials had he been George Michael Gwaltney, private citizen. Only because he was George Michael Gwaltney, CHP officer, was the Federal District Court in the Central District of California able under the Civil Rights Act to gain jurisdiction over him. He was amenable in that forum solely because he was the agent of the State of California acting within the course and scope of his agency at the time he deprived Robin Bishop of her civil rights.

If, without being an agent of the state of California, Gwaltney could not have been convicted in federal court for criminally violating Robin Bishop's civil rights, how is it possible that the State of California is not civilly liable for the self-same acts? Without California's state action, there would have been no federal crime of which Gwaltney could be guilty. Since California's agency has been established beyond a reasonable doubt by Gwaltney's conviction, the same agency as a matter of law and res judicata makes the CHP civilly liable for deprivation of the same civil rights.

Unfortunately, the sad pattern and practice of the CHP's abnegating responsibility and having no liability for its officers' crimes committed in uniform and on duty led, on June 23, 1988, to the conviction of a second CHP officer for the murder of a young, attractive female motorist in San Diego. CHP patrolman Craig Peyer was convicted of murdering Cara Knott of El Cajon, a 20 year old student at San Diego State University, after pulling her car over Dec. 27, 1986.

DATED: July 20, 1988 By Thomas M. Burton

County. Rufus L. Yent, Judge. Affirmed.

Burton, Brunt & Robbins and Thomas M. Burton for Plaintiffs and Appellants.

John K. Van De Kamp, Attorney general, Richard D. Martland, Chief Assistant Attorney General, Marvin Goldsmith, Senior Assistant Attorney General, Randall B. Christison, Supervising Deputy Attorney General, Kristin G. Hogue, Luis R., Vargas, Deputy Attorneys General for Defendants and Respondents.

The appeal here is from a judgment of dismissal following the sustaining of a demurrer. The underlying action was brought by Merlin and June Bishop, almost three years after their 23-year-old daughter Robin (the victim) had been raped and killed by California Highway Patrolman George Michael Gwaltney, and about six months after Gwaltney had been convicted of charges related to the acts noted and sentenced to federal prison for 90 years. The Bishops sued as administrators of the victim's estate and on their own behalf, alleging that Gwaltney, three of this supervisors, and the California Highway Patrol (CHP) had violate plaintiffs' civil rights as secured

under 42 U.S.C. section 1983.[4] Gwaltney defaulted and the demurrer of the remaining defendants was sustained with leave to amend. Plaintiffs declined to amend and the complaint was dismissed as to those defendants. Plaintiffs have appealed from the ensuing judgment of dismissal. After reviewing the record on appeal, on our own motion, we issued an OSC re: sanctions for a frivolous appeal as it related to plaintiffs' appeal against the CHP.

PROCEEDINGS IN THE TRIAL COURT

The complaint alleged that Gwaltney was assigned to the Barstow substation of the CHP and was at all times acting as the agent and servant of the CHP in the course and scope of his employment; that Gwaltney had a "notorious, indiscreet and prurient interest in sex and had developed a pattern and practice of using the

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[4] Section 1983 recites in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis added.)

The state courts of California have concurrent jurisdiction with the federal courts to hear actions brought under 42 U.S.C. section 1983.

complaint sought a total of over $100,000,000 in compensatory and punitive (exemplary) damages and attorney's fees.

The supervisor defendants and the CHP (hereafter defendants) demurred to the complaint on the grounds that it did not state facts sufficient to constitute causes of action (Code Civ. Proc., § 430.10, subd. (e)) because: (1) the CHP, as a state agency, is not a "person" within the meaning of section 1983 (see fn. 1, supra); (2) the supervisor defendants had not personally participated in or caused the alleged deprivations; (3) counts 1 through 5 (cruel and unusual punishment, false imprisonment, unlawful search and seizure, sex discrimination, and failure to protect) and count 10 (impeding the investigation) did not survive the victim's death; (4) the facts alleged in counts 1 (cruel and unusual punishment) and 4 (sex discrimination) were insufficient to constitute such causes of action; (5) the facts alleged in count 5 (failure to protect), count 7 (negligence) and count 10 (impeding the investigation) were insufficient to constitute causes of action cognizable under the federal Civil Rights Act; (6) as to all counts, plaintiffs had an adequate state law remedy.

After a hearing, defendants' demurrer was sustained on all

counts "for failure to state a cause of action under federal civil rights law." Plaintiffs were given 30 days to amend their complaint, but chose not to do so. Defendants then noticed a motion to dismiss the complaint. Thereafter, plaintiffs amended the complaint as to count 7 (negligence) only, and conceded that a judgment of dismissal could be entered against the amended complaint. Such a judgment was entered, and this appeal followed.

DISCUSSION

Plaintiffs contend: (1) they have stated facts sufficient to constitute causes of action against the CHP and against the supervisor defendants for both vicarious and direct liability; and (2) they have adequately pleaded constitutional deprivations under the several theories alleged.

I

LIABILITY OF THE CHP

Plaintiffs content first that the CHP is vicariously liable for Gwaltney's deprivation of the victim's constitutional rights, because such deprivation occurred within the course and scope of Gwaltney's employment. However, plaintiffs rely on cases in which the plaintiffs had sued counties or cities for vicarious liability

L.Ed.2d 358, 99 S.Ct. 1139], the Supreme Court firmly held that states ere not amenable to suit under section 1983 because of the immunity conferred upon them by the Eleventh Amendment. [Citation.] Both Quern and its predecessor, Edelman v. Jordan (1974) 415 U.S. 651 [39 L.Ed.2d 662, 94 S.Ct. 1347], involved an action brought against a state or its officials in federal court.....Plaintiffs argue Quern is inapposite, as they have chosen to proceed in state court [fn. omitted], thus alleviating any potential Eleventh Amendment problems. They do not rely on any direct decisional holding but rather primarily upon a footnote in Maine v. Thiboutot (1980) 448 U.S. 1 [65 L.Ed.2d 555, 100 S.Ct. 2502]....[stating], 'No Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only "[t]he Judicial power of the United States."' (448 U.S. at pp. 9-10, fn. 7 [65 L.Ed.2d at pp. 562-563].)

prerogatives and powers of this office to exact sexual tribute from female motorists whom he apprehended"; that the supervisor defendants knew or should have known of such pattern and practice and taken action to curb it; that the CHP had a "policy, pattern and practice" of allowing Gwaltney and other male officers in the Barstow area to use their official powers for personal sexual gratification, as long as the officer met their traffic citation quotas and generally complied with departmental regulations, and that Gwaltney, using the authority and property of the State of California a, had stopped the victim for speeding and then raped and executed her.

The complaint alleged further that the foregoing actions constituted, as to the victim: cruel and unusual punishment (count 1); false imprisonment (count 2); unlawful search and seizure (count 30; sex discrimination (count 4); failure to protect (count 5); wrongful death (count 6); negligence (count 7); and deprivation of life without due process of law (count 9), and, as to the victim's parents, loss of parenthood (count 8), and deprivation of the due process right to have Gwaltney brought speedily to justice (by impeding the investigation of the victim's death) (count 10). The

under California Government Code section 815.2,[4] which provides for such liability on the part of a "public entity," including a county or a city. In the case here, however, plaintiffs sued the CHP under 42 United States Code section 1983 (see fn. 1, supra), which provides for liability for a "person," and more significantly, as will be amplified hereafter, it has been judicially decided categorically that "a state is not a 'person' under section 1983." (Pyne v. Meese (1985) 172 Cal. App.3d 392, 403.)

Plaintiffs have devoted over 20 pages of their opening brief and several pages of their closing brief to an attempted refutation of the holding in Pyne that a state and its agencies may not be sued as "persons" under section 1983. We have read plaintiffs' arguments with great care, and have concluded that they are more than adequately answered (or anticipated) by the following reasoning in Pyne itself:

"In Quern v. Jordan (1979) 440 U.S. 332 [59

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[4] Section 815.2 recites in relevant part: "(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

"That footnote has not gone unnoticed, either by the courts or commentators. [Citations.] However, the majority of state courts which have directly addressed the issue of whether the holding of Quern is applicable to actions in state courts have held that it is. [Citations.]6/ [In footnote No. 6, the court stated, in relevant part] The United States Supreme Court has not yet decided the issue, and we are unwilling to find the footnote in Thiboutot dispositive....Moreover, we recently held that the state courts of California should apply federal law to determine whether a complaint pleads a cause of action under section 1983 sufficient to survive a general demurrer....in Sykes v. State of California (Dept. of Motor Vehicles) (9th Cir. 1974) 497 F.2d 197, 201, the court held the DMV is not a 'person' within the meaning of section 1983.....

".....Upon reading [the cases cited by defendants], one might conclude the question of whether a state is immune from suit because of the

Eleventh Amendment or whether it is immune because it is not a 'person' are one and the same, i.e., a state is not a 'person' under section 1983 because of the Eleventh Amendment. However, this is not necessarily so.

"One case observed 'two traditional obstacles to suing states in federal courts under 42 U.S.C. § 1983: (1) the eleventh amendment bar against suing states in federal courts; and (2) judicial interpretations of § 1983 holding that states are not "person" within the meaning of the statute.' (....Verner v. State of Colo. (D. Colo. 1982) 533 F.Supp. 1109, 1113.)....." (Pyne v. Meese, supra, 172 Cal.App.3d 352, 401-403.)

In view of all the above, plaintiffs' contention that the CHP may be sued as a "person" under section 1983 is entirely without merit, if not specious. More particularly, there is not a shred of authority cited to support the assertion that the State of California is a person; the legal reality is that all the authority is precisely to the contrary (infra).

is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment"). [4] However, this theory was neither pled nor argued in the trial court. At oral argument, counsel for plaintiffs conceded that the theory had not been pled, but insisted that such an omission was not a problem, because plaintiffs were entitled to recover if their complaint alleged facts which stated a cause of action under any theory, regardless of whether the theory had been identified.

In support of this argument, plaintiffs' attorney referred us to the cases he had cited on thee issue in his reply brief. However, none of the cited cases concerned the failure to plead a statutory theory of recovery; moreover, "the general rule [is] that statutory causes of action just be pleaded with particularity.....[e]very fact essential to the existence of statutory liability must be pleaded." (Susman v. City of Los Angeles (1969) 269 Cal.App.2d 803,809.)

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4 At oral argument, counsel for plaintiffs characterized Section 170001 of the Vehicle Code forcefully as his "best shot" in establishing the liability of defendants, adding that it was plaintiffs' "clearest avenue of recovery."

Moreover, even if the CHP could have been sued under section 1983, it could not have been sued for vicarious liability thereunder. In Monell v. Dept. of Soc. Serv. of City of N.Y. (1978) 436 U.S. 658, the U.S. Supreme Court held that local governing bodies could not be sued for vicarious liability under section 1983. In their reply brief, plaintiffs argue that White v. Orange County, supra, 166 Cal.App.3d 566, held that Government entities could be sued for vicarious liability for police misconduct. However, the suit and the holding in White were based on the California Tort Claims Act, and the suit here and the holding in Monell are based on the Federal Civil Rights Act. [3] More particularly, in White, the court reasoned that "in [California] governmental tort cases, 'the rule is liability, immunity is the exception.'.....Government Code section 815.2, subdivision (a) [see fn. 2, supra], follows common law and imposes governmental liability for injuries proximately caused by acts of employees within the scope of employment." (Id., at p. 570, fn. omitted.)

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[3] Plaintiffs state in their opening brief that their allegations "are not mere tort claims in constitutional guise but because of their gravity, clearly assume substantive due process constitutional dimensions."

More particularly, as the U.S. Supreme Court stated in Monel, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those who edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." (Monell v. Dept.of Soc. Serv. of City of N.Y., supra, 436 U.S. 658, 694, emphasis added.) In the case here, plaintiffs did not and could not allege that the CHP had an "official" policy that its officers should rape and kill female motorists. Accordingly, even if the CHP could have been sued under section 1983, it would not have been directly liable to plaintiffs thereunder on this latter theory.

Plaintiffs also contend that plaintiffs [sic] are directly liable pursuant to Nevada v. Hall (1979) 440 U.S. 410. However, the issue in Nevada was whether the State of Nevada was liable for tort damages based on California law, while the issue in the case here is whether the State of California is liable for violations of federal law (see fn. 3, supra). Accordingly, Nevada has no legal relevance to the case here. In this connection, counsel's representation of the law on this point come perilously close to a violation of Rule 7-105 of the Rules of Professional Conduct.

Plaintiffs also contend that the CHP is directly liable pursuant to Bivens v. Six Unknown Fed. Narcotics Agents (1971) 403 U.S. 388, because Bivens allows direct action founded upon constitutional violations where section 1983 is not available. However, we need not decide whether Bivens applies to this case, because plaintiffs; entire complaint was predicated only on section 1983. More particularly: (1) the complaint is entitled "COMPLAINT FOR VIOLATION OF CIVIL RIGHTS [42 U.S.C., §§ 1983, 1985, 1986, 1988]"; (2) the allegation of each cause of action therein is prefaced by the heading "Violation of Civil Rights (e.g. "FIRST CAUSE OF ACTION" (violation of Civil Rights - Cruel and Unusual Punishment), and (3) the prayer as to each cause of action seeks "damages due to the violation of [the victim's civil rights caused by [e.g.] defendants' cruel and unusual punishment." Accordingly, having limited their pleading to section 1983, plaintiffs cannot credibly argue that the CHP is liable under a different theory. The sophistry here practiced is both clumsy and palpable.

Finally, plaintiffs contend that the CHP is liable to them for having violated section 17001 of the Vehicle Code ("A public entity

In the case here, there were absolutely no allegations in the complaint as to any "operation of [a] motor vehicle" by Gwaltney in committing the wrongful acts complained of. Equally lacking, there were no allegations that plaintiffs had complied with the claims requirements of Government Code section 900 et seq. in connection with the Vehicle Code section 17001 theory of liability. In view of these omissions, plaintiffs' contention that they are entitled to recover under Vehicle Code section 17001 is wholly without merit.

In view of all the above, the trial court properly sustained the CHP's demurrer.

II

LIABILITY OF THE SUPERVISORS

The CHP supervisors named as defendants in plaintiffs' complaint were: (1) James Burchett, the Captain of the Barstow Substation of the CHP; (2) Junior David Martin, the head of the Inland Division of the CHP; and (3) Leonard De Groff, the Director of CHP Personnel. Plaintiffs alleged that the foregoing supervisors "knew or should have known" of Gwaltney's practice of sexually harassing female motorists; that the supervisors took a "laissez-faire" attitude towards such practice and failed to establish a firm

policy to prevent it; that such failure constituted a "reckless disregard" of, or "deliberate indifference" towards, the rights of female motorists, and "a lack of that degree of care which prudent and reasonable individuals [in the supervisors' positions] would show in exercising [their] duties, " and that such failure proximately caused the victim's death.

However, "without a showing of direct responsibility, " a section 1983 action will not lie against police supervisory officers for "failure to act [even] in the face of a statistical pattern" of police misconduct. (Rizzo v. Goode (1976) 423 U.W. 362, 3786, emphasis on "direct" added, emphasis on "failure" in original.) For supervisory officials to be liable under section 1983, there must be an "affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [the officials] -- express or otherwise -- showing their authorization or approval of such misconduct." (Id., at p. 371, emphasis added.)

"The result of Rizzo and subsequent cases in the lower federal courts applying the standards it announced is that a failure of a supervisory official to supervise, control, or train the offending individual officers is not actionable absent a showing that the official

either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum a plaintiff must show that the official at least implicitly unauthorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers. [Citation.]

"Where, as here, the constitutional violation was not alleged to be part of a pattern of past misconduct, a supervisory official or a municipality may be held liable only where there is essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable [citation], or would properly be characterized as substantially certain to result, ..." (Hays .v Jefferson County, Ky (6th Cir. 1982) 668 F.ed 860, 874.)

In the case here, plaintiffs did not and could not allege that the defendant supervisors "directly participated" in raping or killing the victim, or "implicitly authorized, approved or knowingly acquiesced" in the rape and murder, or that the supervisors' failure to train and supervise the CHP personnel was so reckless or grossly negligent that the rape and murder were "almost inevitable" or "substantially certain to result." Accordingly, under the Rizzo/Hays

frivolous is not whether [the attorney] acted in the honest belief he had grounds for appeal, but whether any reasonable person would agree that the point is totally and completely devoid of merit, and, therefor, frivolous.' [Citing cases.]" (In re Marriage of Flaherty, supra, 31 Cal.3d 637, 649.)

In my routine review of the record on appeal and my study of the briefs, I of course encountered Pyne v. Meese, supra, 172 Cal.App.3d 392. There is little if any difference between Pyne and the case before us. In Pyne the plaintiff had undertaken to press a section 1983 case against the Department of Motor Vehicles. In a cogently reasoned opinion Pyne held that no cause of action under section 1983 could be stated against the DMV as an agency of the State of California. That portion of the Pyne opinion which marshals the U.S. Supreme Court cases on this issue we quoted earlier in our opinion dealing with the merits. What we note now is further language in Pyne which categorically states, "Moreover, this court has previously concluded that a state is not a 'person' under section 1983 and we find no reason to reject that holding or reasoning. (Taylor v. Mitzel (1978), 82 Cal.App.3d 665, 670...; see also Mezey v. State of California (1984) 161 Cal.App.3d 1060,

standard recited above, plaintiffs did not state a section 1983 cause of action against the supervisors and the demurrer was likewise properly sustained as to them.

Plaintiffs otherwise rely on Pennhurst State School and Hosp. v. Halderman (1983) 465 U.S. 89, where the issue was whether a federal court could award injunctive relief against state officials on the basis of state law, and Bundy v. Jackson (D.C. Cir. 1981) 641 F.2d 934, where the issue was whether sexual harassment of an employee violated Title VII. Neither of the foregoing cases has any legal relevance to the case here.

In view of our holding that the demurrer was properly sustained as to the CHP and as to the supervisors, we need not address plaintiffs' contention that they have adequately pleaded constitutional deprivations under the several theories alleged.

III

SANCTIONS

In this division for years we have followed an informal policy of not awarding sanctions for a frivolous appeal unless there is unanimous agreement to do so. In this instance, lacking such unanimous agreement, the motion for sanctions will be denied.

DISPOSITION

The judgment is affirmed, and the motion for sanctions is denied.

NOT FOR PUBLICATION

/s/ McDaniel
Acting P.J.

We concur:

/s/ Hews
J.

/s/ Dabney
J.

Concurring Opinion, Bishop v. Gwaltney, EO3161

I concur in the judgment but feel constrained to add some comments with reference to the denial of the motion for sanctions in which I also concurred in accordance with the policy noted in Part III of the opinion.

Counsel for plaintiffs responded in writing to the order to show cause, but, although he had a full opportunity to do so, he made no presentation or comment on the matter at oral argument. During the thirteen years I have held this position, I have never

participated in a; case in which the appeal, on legal grounds, has been so totally devoid of merit. In view of this experience and the comments which follow, I am at a loss to understand why my colleagues do not agree that sanctions should have been imposed.

Disposition of matters of this kind, since 1982, have been controlled by In re Marriage of Flaherty, 31 Cal.3d 637. Under Flaherty there are two possible grounds for concluding that n appeal is frivolous. According to Flaherty, "....an appeal should be held to be frivolous only when it is prosecuted for an improper motive -- to harass the respondent or delay the effect of an adverse judgment -- or when it indisputedly [sic] has no merit -- when any reasonable attorney would agree that the appeal is totally and completely without merit." (Id., at p. 650.)

From these statements by the Supreme Court, it is clear that the grounds are disjunctive, i.e., an appeal may be held to be frivolous if either criterion is present. The latter ground above noted is regularly referred to as the "objective standard," and as to such standard, Flaherty states: "[t]he objective standard looks at the merits of the appeal from a; reasonable person's perspective. The problem involved in determining whether the appeal is or is not

1065....)" (Id., at p. 403.)

Because plaintiffs were and are attempting to proceed against the CHP, in terms of their pleadings, solely on the basis of section 1983, I was and remain particularly impressed by the above-quoted Pyne language that "we find not reason to reject that holding or reasoning." In view of that language, what soon followed in Pyne was compelling. The court said "[t]he [trial] court found the inclusion of these defendants in the action 'is so clearly contrary to established law in this matter that it can only be characterized as frivolous and in bad faith' and awarded those parties attorneys fees under Code of Civil Procedure section 128.5. We agree with the trial court that the order for an award of fees to the State....was proper." (Pyne v. Meese, supra, 172 Cal.App.3d 392, 405, emphasis added.)

It was this language, combined with the obvious circumstances that plaintiffs' counsel is thoroughly familiar with Pyne (he cites it repeatedly in this papers), which largely led the court to issue the order to show cause. What is frivolous in the

his written response to the order to show cause by stating "Irrespective of the unresolved question of state liability in its own courts under § 1983, the CHP is liable under § 17001 for the rape and murder of an innocent and unarmed female motorist by its on-duty employee by means of the State's motor vehicle." (Original emphasis.) There is absolutely no legal basis whatsoever for that statement; in my view, such an imposition on this court cannot be tolerated.

At this juncture, I can do no better than quote from another case involving the issues of sanctions for a frivolous appeal, "[t]he vice of the present case is that it has succeeded to the extent that the state has been put to a considerable expense....in extricating itself from this piece of 'legal flypaper,' not to mention the burden that has been place on the courts. [¶] While we are not able to measure the damage to the legal system or the expense to the state, we can impose sanctions for the taking of this frivolous appeal which.....will [we hope] deter such conduct in the future." (Custom Craft Carpets, Inc. v. Miller (1982) 137 Cal.App.3d 120,

125.)[7]

In my opinion the motion for sanctions should have been granted and $5,000 awarded.

NOT FOR PUBLICATION

/s/ McDaniel
Acting P.J.

[7] In Custom Craft Carpets, Inc. the court awarded $5,000 in sanction. (Id., at p. 123.)

Third District certainly should be frivolous in the Fourth District too. [5]

Plaintiffs' written response to the order to show cause relies primarily on a dissent in a case form Alaska, State v. Green, 633 P.2d 1381. Otherwise, counsel's discussion of U.S. Supreme Court cases is massively and precisely refuted by those portions of Pyne quoted earlier in our opinion.

Accordingly, following the lead of Pyne which itself relied on earlier California decisions that the State of California is not a "person" for purposes of section 1983, we can do naught but conclude that any attempt to appeal based on a contention that the State is a person under section 1983 cannot be anything else but frivolous because, under the Flaherty standard, "any reasonable attorney [who reads the cases] would agree that the appeal is totally and completely without merit." (In re Marriage of Flaherty, supra,

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5. Although there was no motion for sanctions for a frivolous appeal in Pyne, the trial court's award of sanctions under section 128.5 of the Code [sic] Civil Procedure, on analogous grounds, was affirmed. (Id., at p. 405.)

31 Cal.App.3d 637, 650.) [6]

Plaintiffs' counsel himself appears, by implication, to be not too sanguine about his section 1983 position. I am of this view, for at both oral argument and in this written response to the order to show cause re: sanctions he takes the position that his "clearest avenue of recovery" is under section 17001 of the Vehicle Code. Counsel[s section 17001 argument is fatally flawed as we shall demonstrate (infra), and so if it is his "best shot," then the section 1983 effort has been given short shrift even by plaintiff's own counsel.

Section 17001 of the Vehicle Code provides that "A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment." Counsel for plaintiffs points out that the CHP is a "public entity." He says it is indisputable that the rape and murder of the victim were "wrongful acts." He

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[6] I am constrained here to observe that the decision to appeal must have been based upon the advice of counsel, for there is not way that the lay plaintiffs would have been in a position, on their own, to make a decision to appeal.

correctly points out that Gwaltney was an employee of the CHP. He also argues that Gwaltney was acting within the scope of this employment at the time of the wrongful acts. Next counsel argues, "finally it is clear that the rape and murder of Robin Bishop were facilitated by and connected with "the operation of any motor vehicle'...." These facts in the aggregate are characterized by plaintiffs' counsel as bringing plaintiffs' cause within the ambit of section 17001. Such an argument is puerile at best.

First, the statute contemplates death or injury to a victim which is caused by the operation of a motor vehicle. The statute says nothing about being ":facilitated by and connected with" such operation. The victim was not killed by Gwaltney's operation of his CHP unit. More importantly, nowhere in the complaint is there any allegation that the victim's rape and murder were caused by the operation of a motor vehicle.

Finally, it is elementary that any claim pursued pursuant to section 17001 of the Vehicle Code is subject to the Tort Claims Act. In this connection, plaintiffs did not allege compliance with the act. Notwithstanding these gaping deficiencies in the allegations of the complaint, plaintiffs counsel yet has the effrontery [sic] to conclude

Supreme Court, U.S.
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NO. 88-527

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

MERLIN BISHOP, et al.,
Petitioner,

v.

GEORGE MICHAEL GWALTNEY, et al.,
Respondents.

On Petition for Writ of Certiorari
to the California Supreme Court

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the State of California is a "person" as that term is used in 42 United States Code section 1983.

2. Whether, notwithstanding the terms of 42 United States Code section 1983, the State of California is subject to liability where the alleged wrong was not pursuant to any official policy.

3. Whether direct liability may be asserted against the State of California under Bivens v. Six Unknown Federal Narcotics Agents 403 U.S. 388 (1971) where such a case could not be brought under 42 United States Code section 1983.

4. Whether a criminal conviction of a police officer for a civil rights violation gives rise to strict liability against a state.

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RESPONDENTS BRIEF IN OPPOSITION

The respondent, State of California, acting through the Department of California Highway Patrol, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of an order of the Court of Appeal of California, Fourth Appellate District, Docket No. E003161, of January 27, 1988.

REASONS WHY THE PETITION SHOULD BE DENIED

I

THE GROUNDS FOR GRANTING CERTIORARI ARE NOT ONLY ABSENT, THEY ARE NOT EVEN ASSERTED

Neither petitioners' list of questions presented nor any of their arguments claims there is any basis for issuance of a writ of certiorari. Petitioners do not claim there is a conflict between the circuits, within a circuit, or between a circuit and a state court of last resort. Nor have petitioners indicated there is an important issue of federal law which has not been settled by this Court.

Petitioners assert four questions for review. As near as respondent can

tell, they are: (1) the California appellate court erred in holding a state agency is not a person; (2) the California court did not consider petitioners' argument that Monell v. Department of Social Services, 436 U.S. 658 (1978), was inapplicable; (3) there is direct constitutional liability under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971); and (4) because an individual policeman was convicted of a crime, there is sufficient "state action" to find liability as a matter of law.

Respondents submit none of these questions are worthy of the commitment of scarce judicial resources. As will be discussed below, (1) the petitioners did not plead there was an "official policy"

as required by Monell, supra, 436 U.S. 658; (2) as the threshold question of official policy was not satisfied, the question of whether a state is a person need not be addressed; (3) the question of whether a state is a person has been adequately answered, in the negative, by the weight of state and federal appellate opinions, and will be shortly answered by this Court; (4) for numerous reasons, not the least of which is this issue is first raised on appeal, a Bivens, supra, remedy is inappropriate; and (5) the remaining arguments are frivolous.

A. Monell Official Policy

Monell requires there be action pursuant to an official policy which results in the deprivation of

rights. No policy, official or otherwise, is alleged here.

As the California Court of Appeal noted succinctly:

> "In the case here, plaintiffs did not and could not allege that the CHP had an 'official' policy that its officers should rape and kill female motorists. Accordingly, even if the CHP could have been sued under section 1983, it would not have been directly liable to plaintiffs thereunder on this latter theory." (Petition, p. 64.)

Instead, plaintiffs only allege the state (CHP) had a "policy" of allowing the offending officer to use his powers as a policeman for personal gratification. In other words, petitioners equate negligence on the part of the supervisor with an official State policy.

As this Court recently stated in Pembaur v. Cincinnati, 475 U.S. 469 (1986), there must be an allegation an authorized decision maker adopted a policy which, when carried out, resulted in the complained-of act. (475 U.S. at 481.) A plurality of this Court also stated:

> "Municipal liability under section 1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." (Id. at p. 483.) [Emphasis added.]

As petitioners have not alleged anything close to the requisite official

policy, there is no need to consider the other issues they have raised[1/].

B. The State Is Not a Person.

Although there is some contrary authority, the overwhelming majority of decisions addressing the question have held a state is not a person for purposes of the Civil Rights Act. E.g., Toledo, Peoria & W.R. Co. v. State of Illinois, 744 F.2d 1296, 1298-1299 (7th Cir. 1984), cert. denied, 470 U.S. 1051 (collecting and analyzing circuit opinions, and holding a state is not a person) and Smith v. State Dept. of

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1. Petitioners have sought certiorari review based only upon liability of the State of California and its Department of Highway Patrol (Petition, "Questions Presented" segment). Petitioners raised below liability of the wrongdoer's supervisors, which theory has since been abandoned.

Public Health, 428 Mich. 540; 410 N.W.2d 749 (1987), cert. granted, ____ U.S. ___, 99 L.Ed.2d 696 (1988). But see Fleming v. Dept. of Public Safety, 837 F.2d 401 (9th Cir. 1988), cert. denied, ____ U.S. ___, 102 L.Ed.2d 212 (1988) (holding a trust territory is a person but without discussion or even acknowledgement of a majority of opinions to the contrary); Della Grote v. Rhode Island, 781 F.2d 343 (1st Cir. 1986) (a state is a person where the State has waived its Eleventh Amendment immunity).

As this issue has already been argued to this Court in Will v. Michigan Dept. of State Police (No. 87-1207), it hardly makes sense for this Court to address the issue once again in the same term. This is particularly the case

where, as here, it would make no difference in the disposition of the current case: even were the state a person, no official policy is asserted.

II

PETITIONERS' CONFUSED ARGUMENT OF DIRECT STATE LIABILITY UNDER BIVENS AND HALL IS WITHOUT MERIT

Petitioners claim the decisions of Nevada v. Hall, 440 U.S. 410 (1978) and Bivens v. Six Unknown Fed. Narcotics Agents, supra, 403 U.S. 388 (1971) provide an alternative basis for relief. These matters were dealt with by the Court of Appeal succinctly and correctly. (Petition, pp. 64-65.)

First, petitioners have improperly raised this issue for the first time on appeal. (Heckler v. Campbell, 461 U.S.

458, 468 n. 12 (1983).) The only theory presented to the trial court was liability under the Civil Rights Act in several manifestations.

Second, an exercise of review is hardly suggested, much less compelled, by the prior decisions of this Court. Petitioners assert Nevada v. Hall, supra, provides for direct action under federal law. (Petition, p. 34.) Simple inspection shows Hall deals with the issue of the susceptibility to suit under state (California) law when an employee of another state (Nevada) ventures into the first state and commits an ordinary tort. Nothing in Hall supports petitioners' argument of direct liability of a sovereign state under federal law.

Petitioners then assert Bivens provides for a remedy under the constitution when other remedies are not available. Even were this a correct interpretation of Bivens, it does not come into play: petitioners here have other remedies but either failed to use them to their advantage or to use them at all. Petitioners had remedies available to them under the California Government Tort Claims Act (Cal. Govt. Code §§ 810-995.6) but evidently failed to even attempt to bring such an action. In the case of their remedy against the offending officer, Gwaltney, they did not obtain satisfaction. The purpose of Bivens is certainly not the creation of a de facto insurance policy in favor of unsatisfied suitors.

As one court noted, "Bivens actions seek to permit recovery where there has been no remedy available for a violation of a particular law." (Stalnaker v. Boeing Co., 186 Cal.App.3d 1291, 1307 (1986).) [Emphasis added.] Unlike Bivens and Davis v. Passman, 442 U.S. 228 (1979), there were other forms of judicial relief available, but petitioners voluntarily waived them.

Further, even were Bivens relief available, it is clear the remedy would lie against the offending officer and not, by means of vicarious liability, against the State. (Tarpley v. Green 684 F.2d 1 (D.C. Cir. 1982); Fayle v. Stapley 607 F.2d 858 (9th Cir. 1979).)

III

BECAUSE THE PETITION IS UNCLEAR AND INACCURATE, IT SHOULD BE DENIED

Rule 21.5 requires a petition to "present with accuracy, brevity, and clearness" the matter for review. The petition fails to comply with this rule. If for no other reason, this is sufficient basis to deny the petition.

IV

THE REMAINING CLAIMED BASES ARE EITHER NOT SUBSTANTIAL FEDERAL QUESTIONS OR ARE SIMPLY FRIVOLOUS

Petitioners make several claims concerning how the federal civil rights act and the constitution should be interpreted. Upon even cursory analysis, one sees these arguments are, at best,

insubstantial and indeed often frivolous.

A. Vehicular Tort

Petitioners claim they state a federal claim because California Code section 17001 provides for vicarious liability for vehicular torts. (Petition, pp. 17-18.) Obviously, no federal question is presented.

B. Respondeat Superior

Petitioners claim because California state tort law provides for respondeat superior, the Civil Rights Act should also so provide. (Petition, pp. 15-18.) Obviously, state law has little to do with this question of substantive federal law which has been consistently answered by this Court in the negative. (E.g., Monell v. New York City Dept. of

Social Services, 436 U.S. 658, 692-693 (1978); City of Oklahoma City v. Tuttle, 471 U.S. 808, 831 (1985) concurring opinion of Brennan, J.)

C. Indemnification

Petitioners claim because California law provides for indemnification of public employees sued in the course of their duties (Cal. Govt. Code §§ 825-825.6), the Civil Rights Act should provide for vicarious liability. (Petition, pp. 15-17.)[2/] For the same

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2. Petitioner's statement of state law is incorrect. Although a California public employee is entitled to indemnity in most situations, this is not one of them. Government Code section 825 provides the entity shall indemnify an employee who has requested and received an unqualified defense. Government Code section 995.2 provides the public entity may refuse to provide a defense where the act was a result "of actual fraud, corruption, or actual malice." Without question, the acts of Mr. Gwaltney were

reason as above, this question of state governmental relationship hardly presents a basis for altering federal substantive law.

D. Official Capacity Suits

Petitioners claim because suing a municipal employee in his official capacity is the same as suing his employing entity, suing Gwaltney renders the state liable. (Petition, pp. 18-33.) Obviously, Brandon v. Holt, 469 U.S. 464 (1985), makes plain official capacity suits are quite separate and distinct from actions based on respondeat superior. (Id. at pp. 470-471.) Although petitioners named Gwaltney "individually and as [an officer] of the

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the result of actual malice and petitioners do not claim otherwise.

California Highway Patrol," doing so does not change the analysis. "Since official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent . . ." suing Gwaltney in this way is only another way of suing the state directly. (Monell, 436 U.S. 658, 690 n. 55). It does not create a new form of respondeat superior.

E. Right to Travel

Petitioners claim because the decedent had a right to travel, she was deprived by Gwaltney of a federal right. (Petition, pp. 40-43.) For purposes of the pleadings, respondent has assumed there is a protected right, the due process right to life. How casting petitioners' case in terms of a different

federal right avoids the defects of not pleading a official policy, the state not being a person and the rest is neither explained nor explainable.

F. State Action

Petioners claim because Gwaltney was convicted of criminal civil rights violations, there is a finding of state action. (Petition, pp. 43-49.) This argument is baffling. Evidently, petitioners believe there is some separate rule providing for liability if the wrongdoer has committed an act which constitutes state action. No review of controlling authority is necessary--state action is merely one of several requisite elements of a civil rights action. Again, petitioners seem to think

if one or two elements are satisfied, the rest of the case must necessarily follow.

V

PETITIONERS' FAILED TO SERVE THE PETITION IN COMPLIANCE WITH RULE 28

Petitioners purportedly filed with the clerk of this Court its petition for writ of certiorari on July 26, 1988. Service of the petition was made by a private parcel delivery firm to this counsel on August 29, 1988. The petition as received by this counsel recited it was served by being placed in the United States Post Office with postage prepaid on August 24, 1988.

The petition for writ of certiorari was received by the clerk on August 29, 1988, the same day received by this

counsel. It was returned to counsel for petitioner by mail dated September 6, 1988, for failure of compliance with Rule 33. Sometime later a corrected petition for writ of certiorari was filed with the Court.

On November 21, 1988, counsel for respondent caused to have a telephone inquiry made of counsel for petitioner to determine when counsel for respondent would see the corrected petitions. Petitioner's counsel stated he could not say, as he had not yet received the corrected petition himself, but would send one to respondent's counsel as soon as possible.

Rule 33.3 provides service shall be made, "Personally or by mail . . . at or before the time of filing." Not only has

there been no service at or before the time of filing, but also no service was made by mail. Respondent did not receive the corrected petition until December 28, 1988, a full five months after filing.

Although service failures do not deprive this Court of jurisdiction, these errors are not the mere technical mistakes having no relevance to this Court's as was found in Parker v. Levi, 417 U.S. 733, 742, n. 10 (1974); or United States v. Adams, 383 U.S. 39, 42 (1966). Rather, these errors represent a rather cavalier disregard of the rules.

CONCLUSION

For the reasons stated above, it is respectfully submitted this petition should be denied and respondent be allowed its costs.

DATED: January 6, 1989

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General of the
State of California

RANDALL B. CHRISTISON
Deputy Attorney General

Attorneys for Respondent
State of California

FILED
JAN 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-527

In The
SUPREME COURT OF THE UNITED STATES
October term, 1988

MERLIN BISHOP, et al.,
Petitioners,

vs.

GEORGE MICHAEL GWALTNEY, et al.,
Respondents.

On petition for Writ of Certiorari to the California Supreme Court

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REPLY BRIEF

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QUESTIONS PRESENTED

1. Respondents' assertion that Petitioners did not raise or argue below their theory that the California Highway Patrol was susceptible to an action brought directly under the Constitution itself, is false.

2. Respondents' assertion that they had not been properly served so as to raise an aura of prejudice is disingenuous in that Respondents are well aware that the delays in service resulted either from Petitioners' difficulties in satisfying the Clerk of this court with respect to the proper typing size and style or in the failure of the delivery service to locate Petitioners' counsel absent a suite number, and in no respect involved changes in content with respect to the three sets of petitions successively filed.

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I
LIABILITY OF THE CALIFORNIA HIGHWAY PATROL DIRECTLY UNDER THE CONSTITUTION WAS BOTH PLEADED AND ARGUED BELOW

Respondents claim that petitioners improperly raised for the first time on appeal the liability of the California Highway Patrol (CHP) directly under the federal constitution. (Resp. Brief, pp. 9-10.) The Court of Appeal used the same pretext as a means of not addressing this important issue, which Petitioners exposed and refuted in their Petition. (Pet., p. 7, n.2.; Appendix, p. 65).

Petitioners First Amended Complaint plead in detail their reliance upon the constitution:

> As a direct and proximate result of the above described unlawful, malicious, deliberate, and reckless acts and omissions of the defendants committed under color of authority as patrolmen of the CHP and while acting in that capacity Robin Bishop suffered grievous bodily harm and loss of life, all in violation of her rights under the laws and Constitution of the United States, and in particular the

Fourth, Eighth and Fourteenth Amendments thereof and 42 U.S.C. §§ 1983. (First Amended Complaint, ¶ 18 incorporated into all causes of action)

The First Cause of Action states:

As a further result of the above described acts, Robin Bishop was deprived of rights and immunities secured to her under the Constitution of the United States and the State of California including, but not limited to, her rights under the Fourteenth Amendment to be secure in her person, to be free from punishment without due process and to equal protection of the laws.

The Second Cause of Action states:

The defendant Gwaltney acted with malice to deprive Robin Bishop of her civil rights and upon the assumption that such conduct was consistent with the policies and practices allowed by the CHP for officers in the Barstow Substation and would not be detected, or if detected, would not be punished by the remaining named defendants all in violation of the Fourth and Fourteenth Amendments of the United States Constitution.

The Third Cause of action states:

> Defendants acted out of malice and in reckless disregard for the civil rights of Robin Bishop; and in violation of the Fourth and Fourteenth Amendments of the United States Constitution.

The Fourth Cause of Action states:

> Had the defendant Gwaltney apprehended a male motorist under the same or similar circumstances, the defendant Gwaltney would not have engaged in the conduct forming the subject matter of this action; all in violation of the Fourteenth Amendment of the United States Constitution.

The Fifth Cause of Action states:

> . . . . .failed to protect Robin Bishop from harm after taking her into the custody of the State of California, but, on the contrary, inflicted on her great bodily harm torture and death, all in violation of the privileges and immunities of United States citizenship and in derogation of the Fourteenth Amendment of the federal constitution.

The Seventh Cause of Action states:

> ...defendants jointly and severally ignored, tolerated, and

tacitly encouraged aggressive sexual behavior by on-duty male officers toward that segment of the female motoring public consisting of young attractive women traveling alone upon federal interstate 15 in and around Barstow California. Defendants' deliberate indifference toward such female motorists, including Robin Bishop, proximately caused the apprehension, torture and death of Robin Bishop in violation of fundamental rights to life and liberty protected by the Fourteenth Amendment of the United States Constitution.

The Ninth Cause of Action states:

....the defendant Gwaltney in the course and scope of his employment by CHP and as part of the policy, pattern and practice established by and carried out by the defendants jointly and severally, by threats, intimidation and force invaded the privacy, deprived Robin Bishop of her freedom and also her life without due process of law, done with malice and in reckless disregard for the civil rights of Robin Bishop and in violation of the Fourteenth Amendment of the United States Constitution.

The Tenth Cause of Action states:

> The plaintiffs and their decedent as citizens of the Unites States enjoy the privilege of interstate travel on the public highways without the interference of discretionary search, seizures and shooting for personal pleasure by officers of the State of California. Plaintiffs also have a fundamental constitutional right to the due process of law in bringing to bear the judgment of the state in apprehending and punishing those persons who are guilty of violating the civil rights of their decedent.

The Court of Appeal acknowledged that Petitioners raised the direct action issue by stating:

> Plaintiffs also contend that the CHP is directly liable pursuant to Bivens v. Six Unknown Fed. Narcotics Agents..., because Bivens allows direct action founded upon constitutional violations where section 1983 is not available. However, we need not decide whether Bivens applies to this case, because plaintiffs' entire complaint was predicated only on section 1983. (Pet Appendix, p. 65)

Finally, Petitioners summarized in their petition, their direct action argument made below (Pet, pp. 8-11)

Respondents' reliance upon *Heckler v. Campbell* for their position that Petitioners may not in their petition urge direct constitutional liability is misplaced, (Opp. Brief, p. 9). Instead, the case merely held that because the Respondent in that case did not raise her due process or regulatory arguments below, the case did not constitute an exceptional one warranting review by this court, 461 U.S. 458, 468, n.12 (1983). In the case at bench, the direct action argument was made extensively below and may, therefore, properly be considered in support of the petition.

II

RESPONDENTS ARE NOT PREJUDICED BY THE LATE SERVICE OF THE THIRD RETYPED VERSION OF THE PETITION

The initial filing of the Petition was made with the Clerk of this court on July 26, 1968. The Petition was returned on or about August 3, 1988 because it had an additional cover page which needed to be removed, because, notwithstanding its having been laser-printed, it was regarded as a form of typewriting and was not double spaced, because all parties not spelled out on the cover page

needed to be separately listed, and because the appendix was not double spaced.

The corrected Petition was mailed back to the Clerk and served on August 26, 1988, but was again returned because the court of appeal opinion in the appendix, being this time a reduced photocopy, was no longer considered double spaced or able to satisfy the margin width requirements.

A third corrected version with a retyped appendix was mailed back to the clerk with instruction to the copying service to send by a private delivery service the corrected version to the Attorney General. Not until much later when the package was returned by the service did it appear that the Petition was not delivered because of the absence of a suite number from the address.

In none of the three versions of the Petition was there any content change, and the copy received by the Attorney General on August 29, 1988 was the same as the one received by him on December 28, 1988. Only the Appellate opinion was retyped. Counsel apologized to opposing counsel for the oversight of the copying service and only used that method of sending the corrected copies to opposing counsel because he thought it would speed

delivery of the corrected copy as soon as it was completed.

In no instance was there intended a cavalier disregard of the rules of this court or any prejudice to the Attorney General.

III

CONCLUSION

Inasmuch as Respondents have not addressed the issues raised by the Petition, let alone answered them, Petitioners have nothing to add to the Petition except as noted herein.

Dated: January 13, 1989

Thomas M. Burton

PROOF OF SERVICE

I am a citizen of the United States, and am over the age of eighteen (18) years. I reside and am employed in Pleasanton, California and am not a party to the within action; my business address is 5820 Stoneridge Mall Road, Suite 100, Pleasanton, California 94566.

On _____, 1989, I served the within:

Reply Brief

in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Pleasanton, CA., addressed as follows:

Randall B. Christison

Deputy Attorney General

110 West A Street, Suite 700

San Diego, CA 92101

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, 1989 at Pleasanton, California.

_____

Thomas M. Burton